

Be Careful What You Wish For: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act

PETER J. HENNING*

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I. INTRODUCTION

It is interesting that a once obscure thirty-five year-old statute has now become the focus of an academic symposium and a serious lobbying effort on Capitol Hill to change its scope. The Foreign Corrupt Practices Act (FCPA) had largely lain fallow after its enactment,¹ the subject of occasional modest

* Professor of Law, Wayne State University Law School. I appreciate the comments and suggestions of my colleagues on the Wayne State University Law School faculty who allowed me to inflict an earlier draft on them. The author may be contacted at peter.henning@wayne.edu.

¹ See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 103 (2010) (“During the first quarter century of the FCPA’s history, enforcement of the law appears to have been minimal, at best.”); Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained*,

settlements by companies, many of them resource-extraction firms, with the Securities and Exchange Commission (SEC) and Department of Justice.² Then, a few years ago, the FCPA rather suddenly became the “true love” for prosecutors to expand federal oversight of international corporate conduct.³ Tucked away in the Securities Exchange Act of 1934, the statute prohibits bribery of foreign officials in connection with obtaining or retaining business overseas along with a requirement that companies with publicly traded securities maintain accurate books and records.⁴

The FCPA has become the centerpiece in the Department of Justice’s strategy for policing multinational corporations, whether headquartered in the United States or elsewhere. The top ten settlements in overseas bribery cases have come since 2008, and most are with companies headquartered outside the United States.⁵ Former Attorney General John Ashcroft noted that increased enforcement of the law is a result of greater international cooperation fostered by the September 11 attacks and the attention that has been paid for the role of corruption in terrorist activities.⁶

In November 2010, Lanny Breuer, the Assistant Attorney General for the Criminal Division at the Department of Justice, told a conference that “we are

Defended, and Justified, 29 REV. LITIG. 439, 449 (2010) (“Twenty years after the FCPA’s passage, only seventeen companies and thirty-three individuals faced prosecution.”).

² See Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008) (“Between 1978 and 2000, the SEC and the Department of Justice together averaged only about three FCPA-related prosecutions a year.”).

³ Judge Jed S. Rakoff, before his appointment to the federal district court, described the federal mail fraud statute in this way:

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law “darling,” but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980). The FCPA seems to have become the new object of the Department of Justice’s affections.

⁴ 15 U.S.C. §§ 78dd-1 (foreign bribery), 78m (books and records) (2006).

⁵ See Richard L. Cassin, *With Magyar in the New Top Ten, It’s 90% Non-U.S.*, FCPA BLOG (Dec. 29, 2011, 1:28 PM), <http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html>.

⁶ John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 25, 29 (2012) (“Due to the very nature of FCPA cases, successful prosecution is difficult, and sometimes impossible, without the kind of international collaboration that evolved after 9/11. Because evidence, documentation, and witnesses necessary to support allegations of bribes or corrupt payments are often physically located on foreign soil, many FCPA violations simply cannot be pursued without the cross-border cooperation between various national authorities.”).

in a new era of FCPA enforcement; and we are here to stay.”⁷ The statute’s importance will only increase over the next few years as the SEC ramps up its Office of the Whistleblower to implement the bounty provisions of the Dodd-Frank Act. Under the program authorized by Congress, the agency pays out monetary rewards of at least ten percent—and as much as thirty percent⁸—of any sanctions over \$1 million for those who report a violation of the securities laws, including the FCPA.⁹

Although at one time the likely penalty for an FCPA violation might run in the hundreds of thousands of dollars, and in rare cases a few million dollars, prosecutions in the past few years have resulted in significant monetary penalties. Siemens A.G. paid the largest criminal and civil penalties in an FCPA case in 2008, totaling \$800 million,¹⁰ while Kellogg, Brown & Root LLC was fined \$402 million in 2009.¹¹ Similarly, JGC Corp., a Japanese engineering company, was fined \$218.8 million in 2011,¹² and a French energy construction firm, Technip S.A., paid a \$338 million fine in 2010.¹³ And while the Department of Justice and SEC, which have concurrent criminal and civil jurisdiction over enforcement of the FCPA, historically had brought fewer than fifteen cases per year, since 2007 that number has increased exponentially, with a peak of seventy-four criminal and civil cases filed in 2010.¹⁴ In a further sign

⁷ Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Speech at the 24th Annual Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>. In a speech given in January 2011, Mr. Breuer said that the FCPA, “which was once seen as slumbering, is now very much alive and well.” Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Speech at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association (Jan. 26, 2011), *available at* <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html>.

⁸ 15 U.S.C. §§ 78u-6(b)(1)(A)–(B) (2006).

⁹ 17 C.F.R. § 240.21F-3(a) (2012).

¹⁰ Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

¹¹ Press Release, U.S. Dep’t of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), *available at* <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>.

¹² Press Release, U.S. Dep’t of Justice, JGC Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), *available at* <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>.

¹³ Press Release, U.S. Dep’t of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), *available at* <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>.

¹⁴ See Ashcroft & Ratcliffe, *supra* note 6, at 27 (“From 1977 to 2006, the DOJ and SEC rarely brought more than a few, isolated cases each year. Since that time, however, enforcement of the FCPA has dramatically surged at exponential rates. Illustrative of this point, the total number of FCPA cases brought by the DOJ and SEC from 2007 to 2009 more

of the aggressive expansion of FCPA enforcement, prosecutors and investigators have begun to target entire industries, such as pharmaceutical manufacturers and Hollywood movie production companies, for scrutiny related to their overseas dealings.¹⁵

This increased prosecutorial effort to address foreign bribery by businesses triggered criticism of the “aggressive” interpretations that resulted in what has been perceived as overbroad enforcement of the law, requiring companies to spend too much on compliance.¹⁶ A *Wall Street Journal* editorial decried the growing prosecutions, asserting, “[T]he Obama Administration’s overzealous prosecution is leading to uncertainty and injustice. Congress and the courts need to curtail this latest antibusiness crusade.”¹⁷ Rousing a long-dormant statute to prosecute global corporations has triggered a lobbying effort to “reform” the FCPA, led by the hallowed United States Chamber of Commerce. Perhaps the

than doubled the total of all such cases brought in the statute’s first 30 years. In 2010, FCPA prosecutions nearly doubled again.”).

¹⁵ See Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep’t of Justice, Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at* <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf> (“I would like to share with you this morning one area of criminal enforcement that will be a focus for the Criminal Division in the months and years ahead—and that’s the application of the Foreign Corrupt Practices Act . . . to the pharmaceutical industry.”); Samuel Rubinfeld, *FCPA Goes to Hollywood over China Dealings*, *Corruption Currents*, WALL ST. J. (Apr. 25, 2012, 3:37 PM), *available at* <http://blogs.wsj.com/corruption-currents/2012/04/25/fcpa-goes-to-hollywood-over-china-dealings/>.

¹⁶ Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 410 (2010); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 1001 (2010) (“The façade of FCPA enforcement also contributes to overcompliance by prompting risk-averse companies to reflexively launch expensive and time-consuming internal investigations when the alleged conduct at issue may not even violate the FCPA.”); Pete J. Georgis, Comment, *Settling with Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U. L. REV. 243, 247 (2012) (“Ultimately, risk-averse companies have been forced into an environment where heightened levels of risk and over-compliance have led to the formation of intricate and expensive corporate compliance programs.”).

¹⁷ Editorial, *Justice’s Bribery Racket*, WALL ST. J. (Feb. 17, 2012), <http://online.wsj.com/article/SB10001424052970203711104577199412696071528.html>.

The editorial noted that News Corporation, which owns the *Wall Street Journal*, is under investigation for possible violation of the FCPA based on illegal payments made to British police officials to obtain information for use in publishing stories in publications in Great Britain. It claimed that “[i]f [the Department of] Justice tries to portray payments made as part of traditional news-gathering as criminal acts, the list of felons won’t stop at the tabloids.” *Id.* It is not clear that bribing officials to obtain information would constitute a “traditional news-gathering” procedure, and justifying corrupt payments on the grounds that it somehow served a greater good is an argument that can be made about most any business crime. Some have referred to this by the pithy phrase “the end justifies the means.”

most far-reaching suggestion would alter how the government can prove a violation by giving companies a defense to charges based on the creation and implementation of internal compliance programs designed to prevent and detect violations of the law.¹⁸ The Chamber of Commerce's Institute for Legal Reform retained former Attorney General Michael Mukasey to testify before a House subcommittee in June 2011 about a range of proposed steps Congress should take to "improve" the FCPA, including a compliance defense.¹⁹ An unspoken facet of the push to add a compliance defense is that such a provision would make it harder to convict a company by shifting the focus away from the actions of employees to the organization's efforts to prevent violations through its compliance program.

As is often the case in an effort to alter the scope of a criminal provision, the overt purpose cannot be to make it easier to perpetrate more crimes. Proposed amendments to the FCPA are usually justified as furthering other socially beneficial goals without increasing the likelihood of expanded misconduct. This is particularly the case when the conduct involved is one as clearly unacceptable as bribery, something universally abhorred—at least in public—and subject to prosecution in every nation.²⁰ Thus, proposed amendments have been couched in terms of making the FCPA more "fair" by empowering businesses to do an even better job of monitoring themselves to prevent future violations.

¹⁸ Other proposals offered to curtail the application of the FCPA include imposing a heightened "willfulness" requirement to establish a criminal violation, see Gregory M. Lipper, *Foreign Corrupt Practices Act and the Elusive Question of Intent*, 47 AM. CRIM. L. REV. 1463, 1489 (2010) ("Courts are shortchanging the Act's willfulness requirement, and the actual application of the 'conscious avoidance' standard continues to risk criminalizing negligence."), or adopting an explicit corporate leniency policy so that companies have sufficient incentives to report violation, see Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 157 (2010) ("Extraordinary investigation and cooperation by multinational corporations warrant extraordinary credit akin to that offered under the Antitrust Division's Corporate Leniency Program.").

¹⁹ *The Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 2 (2011) [hereinafter *Mukasey Testimony*] (written testimony of Hon. Michael B. Mukasey), available at <http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf>.

²⁰ See Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 793 (2001) ("Corrupt acts by public officials are not countenanced in any political regime, at least not publicly, if that government wishes to retain its authority to enforce the law."); Andrea D. Bontrager Unzicker, Note, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEGAL STUD. 655, 659 (2000) ("Bribery is universally shameful, but despite the host of negative effects tied to international corruption and the fact that virtually every country in the world has laws against domestic bribery, many nations have been unwilling, until recently, to address the problem.").

No one is in favor of corruption, of course, so proposals for change often contain a caveat about the nature of the suggested alteration to ensure it is not perceived as an appeal to authorize greater criminality. One article arguing for greater clarity in the law stated, “Of course, enforcement of a U.S. law to decrease global corruption is a good thing.”²¹ A proposal for a new set of SEC rules to “provide a measure of regulatory certainty to public companies”²² noted that it did “not advocate repeal or weakened enforcement of the FCPA.”²³ In arguing for greater guidance from the Department of Justice about the scope of the statute, three practicing attorneys explained that “[t]he goal in requesting this guidance is not to weaken FCPA enforcement but to provide greater clarity to companies seeking to ensure compliance with the statute.”²⁴ Changing the statute is sometimes presented as an almost unalloyed good, the proverbial “win-win” scenario in which the law is still vigorously enforced while American business reaps the benefits from new foreign investments. In a press release supporting Mr. Mukasey’s proposed amendments to the law, the president of the Institute for Legal Reform stated that the Subcommittee’s hearing was “an important step toward modernizing the Foreign Corrupt Practices Act, a [thirty-four] year-old law that has become a stumbling block for America’s ability to compete in today’s global economy.”²⁵

Support for changes in the FCPA is not unanimous, especially among global organizations concerned about continuing corruption in the developing world. A letter sent in January 2012 to Congress from a coalition of thirty-three organizations, including Amnesty International, Human Rights Watch, and Transparency International-USA, argued that efforts to amend the FCPA would undermine the statute and send a message to the rest of the world that the United States would no longer take the lead in international anti-corruption efforts.²⁶ While these groups do not have the clout wielded by the Chamber of

²¹ Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 560 (2011).

²² James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1233 (2007).

²³ *Id.* at 1239.

²⁴ Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1270 (2008).

²⁵ Press Release, Inst. for Legal Reform, U.S. Chamber Institute for Legal Reform: House Hearing Is an Important Step Toward Modernizing FCPA (June 14, 2011), available at http://www.instituteforlegalreform.com/component/ilr_media/30/pressrelease/2011/533.html. Given my advanced age, I am not sure I have ever considered a thirty-five year old law as one that needs modernizing.

²⁶ See Press Release, Transparency Int’l, Broad Coalition of 33 Civil Society and Socially Responsible Investment Leaders Call on Congress to Refrain from Introducing Legislation Amending FCPA (Jan. 12, 2012), available at www.transparency.org/news/pressrelease/20120112_fcpa; Letter from civil society organizations and investors to members of the United States House of Representatives (Jan. 12, 2012), available at

Commerce and other business organizations on Capitol Hill, the burgeoning lobbying effort over the FCPA is sure to highlight the tension between business interests and ethical obligations, and the trade-off between fostering commercial success and responding to moral imperatives.

All this for a law that, in the grand scheme of federal criminal prosecutions, could be viewed as quite minor. In 2011, the Department of Justice reached settlements with corporations in ten different cases, with fines ranging from \$21.4 million paid by Johnson & Johnson for payments made to foreign healthcare providers²⁷ to \$63.9 million paid by Deutsche Telekom A.G. and its Hungarian subsidiary for payments to officials in Macedonia to slow changes in that country's reform of its telecommunications laws.²⁸ While the dollar figures are not trivial, the amounts paid in criminal and civil penalties are often a drop in the bucket for large multinational companies like Johnson & Johnson or Deutsche Telekom, which have billions in annual revenue.²⁹ Looking at the number of federal criminal cases, in fiscal year 2009 there were over 25,000 defendants sentenced for drug convictions and nearly 26,000 in immigration cases, while 177 organizations were sentenced that year for all criminal offenses.³⁰ Thousands of drug and immigration offenders are sent to federal

<http://www.scribd.com/doc/78041628/Defending-the-FCPA-CSO-Letter-to-U-S-House-Jan-12-2012> (last visited Oct. 30, 2012).

²⁷ Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), *available at* <http://www.justice.gov/opa/pr/2011/April/11-crm-446.html>.

²⁸ Press Release, U.S. Dep't of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly \$64 Million in Combined Criminal Penalties (Dec. 29, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-mt-dt-press-release.pdf>.

²⁹ Deutsche Telekom's 2011 revenue was €58.7 billion. *See 2011: Key Financial Data*, DEUTSCHE TELEKOM, <http://www.telekom.com/investor-relations/key-facts/financial-overview/119580> (last visited Nov. 18, 2012). Johnson & Johnson's 2011 sales were \$65 billion. *See Johnson & Johnson Reports 2011 Fourth-Quarter and Full-Year Results*, JOHNSON & JOHNSON (Jan. 24, 2012), <http://www.investor.jnj.com/releasedetail.cfm?ReleaseID=641760>.

³⁰ U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009, at 10–12 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. Many dispositions of criminal investigations involving corporations do not involve formal sentencing by a federal judge because the case is resolved through a deferred or non-prosecution agreement in which there is no judicial involvement. That is especially true for FCPA prosecutions, which are routinely concluded through an agreement between the company and the Department of Justice and SEC. *See* Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 350 (2011) ("Today, very few FCPA cases go to trial, and most that do involve individual defendants rather than corporate entities. One of the most recent and most controversial trends in FCPA enforcement is the imposition of external compliance monitors as a term in a pre-trial diversion agreement between the government and the defending corporation.").

prison every year, and even more in the states, yet the FCPA is the focus of so much attention because the upswing in enforcement of its overseas bribery prohibition is hitting a particularly potent constituency. Companies now have to pay attention to the possibility that they will become the target of a government investigation, which certainly makes them uncomfortable and willing to suggest changes to the statute.

The biggest challenge to the continuing application of the FCPA comes from the proposal to create a defense based on a company's compliance program. Unlike other possible amendments to the statute, which arguably provide only "clarification" of the scope of the law, but may not have much impact on future prosecutions, a compliance defense would make it more difficult to successfully prosecute a corporation for FCPA violations by its employees and agents. The net effect would be fewer prosecutions and a greater likelihood that companies will resist charges by taking cases to trial. Whether a reduction in corporate criminal liability for overseas bribery is the best approach to enhancing the efficacy of corporate compliance programs is an open question.

The decision to allow corporations to offer a defense to potential criminal charges is not new. The Model Penal Code provided a company with a defense to a charge if it could show by a preponderance of the evidence that a "high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."³¹ Well before increased FCPA enforcement roused the Chamber of Commerce to seek a compliance defense, Professor Pamela Bucy argued that in corporate criminal prosecutions the government should have to prove that there was a "corporate ethos" that permitted, and even encouraged, a violation in order to hold the organization liable for the acts of its agents.³²

Proposals for some form of compliance defense have not been limited to just FCPA prosecutions, and could apply to any prosecution of an organization.³³ But concerns over the application of the statute to a wider range of corporate America seems to have galvanized support for change from constituencies uneasy with the scope of corporate criminal liability.³⁴ If adopted for the FCPA, a defense that focuses on corporate compliance measures can be the basis to push Congress to authorize it for other criminal provisions, such as securities fraud or environment violations, in which organizations are frequently the focus of investigations. The proposals for an FCPA defense are, if you will,

Nevertheless, the number of prosecutions of business organizations is quite small, and those involving corporations with shares traded on the public markets are uncommon, even though they tend to receive significant coverage in the business press.

³¹ MODEL PENAL CODE § 2.07(5) (1985).

³² Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991).

³³ See *supra* Part III.

³⁴ See *supra* text accompanying notes 16–19.

the camel's nose inside the tent, perhaps giving companies a first taste of how to resist a government investigation and avoid criminal charges for the conduct of employees that can then be extended to a wider array of criminal laws. The defense would shift the issue of compliance from a sentencing factor to an issue of fact, which a jury would have to decide, creating greater uncertainty regarding the application of the criminal law to corporations.

If such a defense were to be enacted, then it should be analyzed within the broader parameters of other criminal law defenses, and its implications for proving guilt understood more clearly. Before adopting some form of compliance defense, its potential implications should be considered to determine whether it should be adopted and how it should be implemented. In this Article, I look at some permutations of a defense based on a company's efforts to prevent and detect violations by its employees and agents to understand how it relates to other types of criminal law defenses, and what its implications might be for prosecutors and the organization. The defense will impact how the government investigates a case, such as the type of information it will seek before deciding whether to pursue charges, and what evidence it will try to use at trial to overcome the defense, something it has not had to do to this point in time. How the defense is constructed will impact the investigative process, and influence the number of cases brought based on its degree of effectiveness in permitting a company to avoid conviction. Fewer FCPA prosecutions is not necessarily an unwelcome by-product of the defense, although it could lead to the perception of weaker law enforcement against those with the great economic and political resources—reinforcing the view of some created by the Supreme Court's decision in *Citizens United* that corporations are the beneficiaries of special treatment by the courts.³⁵

Part I of the Article considers the nature of corporate criminal liability and recent efforts by corporations to increase the resources committed to their internal compliance programs. Part II looks at different permutations of the defense, which range from placing the burden on the government to prove beyond a reasonable doubt that a company's compliance program is ineffective to allowing it to offer evidence as an affirmative defense. The nature and scope of the defense is tied to different rationales for adopting it, and these are considered for any light they shed on how the defense should be structured.

Part III considers how the compliance defense fits with other commonly accepted criminal defenses, and concludes that it mirrors in some ways the widely recognized defense of entrapment. For both defenses, the government's role in encouraging conduct plays a central role in determining the defendant's liability. For entrapment, official misconduct plays a central role in assessing whether an otherwise innocent person was enticed to engage in criminality, while a compliance defense would view the government's pressure on companies to institute compliance programs as integral to assessing its liability.

³⁵ *Citizens United v. FEC*, 558 U.S. 310 (2010).

As a nonexculpatory public policy defense, a compliance defense would operate along the same lines as entrapment by allowing a corporation to avoid conviction based on governmental action, encouraging the creation of a compliance program, much like entrapment provides a defense based at least in part on the conduct of governmental agents furthering the criminal plan. Understanding the compliance defense as a nonexculpatory public policy defense has important implications for how the government will try to overcome it by seeking evidence of a company's propensity to act improperly, thus undermining the claim of an effective compliance program, to show how it has failed to respond to potential violations and did not cooperate fully in the government's investigation of wrongdoing. Corporations being investigated may be inviting a much wider inquiry into their operations if the government will seek to prove that a compliance program does not meet the standard for avoiding liability—information corporations might wish to avoid being made public at a trial.

II. THE RISE OF CORPORATE COMPLIANCE

It is hard to say that there is a lack of corporate compliance programs today, at least among larger business organizations. As Professor Miriam Baer pointed out, companies “are the subject of numerous statutes and regulatory regimes that directly and indirectly require them to adopt programs designed to ward off internal misconduct, and threaten highly punitive consequences for their failure to do so. As a result, corporate compliance has evolved into a universal corporate governance activity.”³⁶ The origins of this culture of corporate compliance are traceable, at least in part, to the FCPA, which grew out of internal investigations conducted by a number of corporations in the mid-1970s in response to reports of overseas bribery.³⁷ By the end of the SEC's inquiry into the issue, almost 400 companies voluntarily reported making improper payments to foreign officials.³⁸

³⁶ Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 951–52 (2009) (internal quotation marks omitted). Professor Baer pointed out that “[t]he sheer size of the compliance industry, which includes multiple American Lawyer 100 firms who proudly trumpet their assistance on their websites, severely undercuts the notion that corporations and compliance providers are engaged in a concerted, bad-faith attempt at intentional window-dressing.” *Id.* at 952.

³⁷ See Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1583 (1990) (“In the end, four hundred companies admitted to questionable or illegal payments totalling \$300 million.”).

³⁸ *Id.*; see also Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model For Command Responsibility*, 47 WILLAMETTE L. REV. 25, 61 (2010) (“The explosive growth in new FCPA cases has been successful in inducing vast changes in the corporate culture. Faced with the heightened prospect of enforcement actions, companies are now scrambling to establish effective corporate compliance programs, to instill a proper ‘tone at the top,’ to

Over the last twenty years, an entire industry has developed to help corporations maintain effective compliance programs and deal with reports of wrongdoing.³⁹ As described by Professor Baer, “[c]ompliance is a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law.”⁴⁰ The impetus for the growth of these programs involves the government’s increased use of criminal and civil sanctions to regulate corporations, and the incentives created to make compliance a means to mitigate potential penalties. The next step in the process is now on display: the effort to create a compliance defense shows the evolution of these programs from a nuisance to a positive social good that can serve as the basis to negate corporate criminal liability.

A. *The FCPA*

The United States was the first country to prohibit payments of overseas bribes by domestic businesses, and for a number of years stood virtually alone in that regard. Multinational companies at that time complained about the FCPA creating the oft-mentioned “uneven playing field” because foreign competitors not subject to American laws continued making corrupt payments, which in some jurisdictions were even tax-deductible as business expenses. In 1997, however, the Organisation for Economic Cooperation and Development (OECD) adopted a convention requiring signatories to amend their domestic laws to criminalize bribery of foreign officials for business purposes.⁴¹ Since then, most developed nations have adopted provisions to implement the convention that are similar to the FCPA, and countries like Germany and France—once seen as quite tolerant of overseas bribery—have begun to crack down on domestic companies for questionable conduct abroad.⁴² Congress

take the initiative in investigating potential violations, and in some cases to voluntarily self-report any corrupt activities that are discovered.”).

³⁹ See Tanina Rostain, *The Emergence of “Law Consultants,”* 75 *FORDHAM L. REV.* 1397, 1404 (2006) (“The onus on companies to develop internal compliance structures to address various regulatory agendas has given rise to a bewildering array of compliance consulting services.”).

⁴⁰ Baer, *supra* note 36, at 958 (internal quotation marks omitted).

⁴¹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 *I.L.M.* 1.

⁴² See Andrew Tyler, Note, *Enforcing Enforcement: Is the OECD Anti-Bribery Convention’s Peer Review Effective?*, 43 *GEO. WASH. INT’L L. REV.* 137, 144, 161 (2011) (“France and Germany in particular felt enforcing bribery laws would be difficult and also likely wanted to shield their domestic business tax deductibility protections for bribes In 2010, more than ten years after the Convention went into effect in 1999, the corruption landscape has drastically changed; all thirty-eight Convention signatories have conforming anti-bribery implementing legislation in place, thirty-seven more than had anti-bribery legislation in 1997, including most of the world’s largest economies and exporters.”).

amended the FCPA in response to the OECD Convention to expand the statute to allow federal authorities to pursue a case against any “person” that comes within the jurisdiction of the United States by transacting business within the country.⁴³

The FCPA regulates two related areas: foreign bribery and the requirements for publicly traded corporations to provide proper accounting and internal controls. The antibribery provision prohibits conduct by “issuers,” “domestic concerns” and any “person,” including anyone acting on their behalf, to:

[W]illfully; (2) make use of the mails or any means or instrumentality of interstate commerce; (3) corruptly; (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (5) any foreign official; (6) for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage; (7) in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person.⁴⁴

An “issuer” is a company with securities registered with the SEC or otherwise required to file reports with the agency, and includes a company’s officers, directors, employees, or agents.⁴⁵ The term also covers foreign companies with shares listed on a United States stock exchange, including American Depositary Receipts. The definition of a “domestic concern” is broader, reaching “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States”⁴⁶ Almost any business operating in the United States is covered by the antibribery

⁴³The amendment to the FCPA removed a requirement that the government prove a territorial nexus between the bribe and the business sought outside the country if the violation was by a United States individual or company. The statute defines a “person” subject to the anti-bribery prohibition as:

any natural person other than a national of the United States (as defined in section 1101 of Title 8)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

15 U.S.C. § 78dd-3(f)(1) (2006).

⁴⁴*United States v. Kay*, 513 F.3d 432, 439–40 (5th Cir. 2007) (quoting 15 U.S.C. §§ 78dd-2, 78ff) (alterations in original) (internal quotation marks omitted).

⁴⁵15 U.S.C. § 78dd-1(a) (2006) (“It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78f of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer . . .”).

⁴⁶*Id.* § 78dd-2(h)(1).

prohibition of the FCPA, regardless of whether its shares are traded on the public markets or are closely held. Any “person,” regardless of nationality, who acts within the United States is covered by the FCPA.⁴⁷ Thus, a foreign headquartered company that does not qualify as an “issuer” can be subjected to prosecution in the United States so long as one aspect of the corrupt payment occurred in this country.⁴⁸

The FCPA exempts what are sometimes referred to as “grease” payments given “to expedite or to secure the performance of a routine governmental action” by a foreign official.⁴⁹ The types of payments generally recognized as permissible include those to obtain permits, licenses, or other official documents; process government-issued documents, such as visas and work orders; secure police protection, mail pick-up and delivery and other routine services; and obtain telephone service, power, water, the loading and unloading of cargo, protection of perishable products, and scheduled inspections.⁵⁰ The FCPA also provides an affirmative defense if the payment was lawful under the written laws and regulations of the foreign official’s country, or it was a reasonable and bona fide expenditure, such as travel and lodging expenses, designed for: “(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”⁵¹

⁴⁷ Although the FCPA is ambiguous, its legislative history and case law confirm that foreign subsidiaries of U.S. companies acting on their own behalf and not as agents of covered persons fall outside the antibribery provisions. Furthermore, foreign individuals who are not officers, directors, employees or agents of either a U.S. company, a subsidiary acting on behalf of an issuer or domestic concern, or a foreign issuer generally are not subject to the FCPA. If a foreign subsidiary or a foreign person not otherwise covered by the law performs any acts in furtherance of a prohibited payment within the United States, such as sending an e-mail to a U.S. recipient or making a telephone call to the United States, they may be directly liable under the FCPA’s territoriality jurisdictional prong.

⁴⁸ *Id.* § 78dd-3(f)(1).

⁴⁹ *Id.* § 78dd-2(b). The FCPA also provides that:

The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

Id. § 78dd-2(h)(4)(B).

⁵⁰ *Id.* § 78dd-1(f)(3)(A).

⁵¹ 15 U.S.C. § 78dd-1(c)(2) (2006). Another important limitation on the scope of the FCPA is that it cannot be applied to the *recipient* of the payment. Congress expressly excluded foreign officials from being prosecuted for a violation, leaving them to their own governments to deal with. In *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), the Fifth Circuit held that the general federal conspiracy statute could not be used to prosecute foreign officials who agreed to accept corrupt payments to award contracts even though they entered into an agreement with the bribe-payer. *Id.* at 833.

The bribery provisions of the statute have become a focal point for multinational corporations, but the other part of the FCPA that required companies to maintain accurate books and records was a powerful impetus for creating corporate compliance programs. Corporations that have issued publicly traded securities must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁵² The records must accurately reflect both the financial information about a transaction and any other information necessary to furnish a complete understanding of its significant aspects. In the context of overseas bribery, the books-and-records requirement prevents secret transactions or the creation of “slush funds” that can be used for bribes, kickbacks, and other forms of corrupt payments. In addition to accurate records, the FCPA requires corporations to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” that:

- (i) transactions are executed in accordance with management’s general or specific authorization;
- (ii) transactions are recorded as necessary [] to permit preparation of financial statements in conformity with generally accepted accounting principle . . . and [] to maintain accountability for assets; [and]
-
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.⁵³

B. The Federal Sentencing Guidelines

The requirement to implement adequate internal accounting controls was the first step in the push for companies to adopt measures to ensure they were fulfilling their legal obligations. Another significant impetus came in 1991 when the United States Sentencing Commission adopted the Sentencing Guidelines for Organizations (Organizational Guidelines) that allows a corporation that has an effective compliance program and cooperates with the authorities to mitigate up to 95% of a potential criminal fine for a violation.⁵⁴ Corporations responded by adopting more extensive compliance systems to ensure there was a means for management to learn about problems within the organization in order to address and report them before they came to the attention of prosecutors. The Organizational Guidelines set forth the basic requirement that a company should: “(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the

⁵² 15 U.S.C. § 78m(b)(2)(A) (2006).

⁵³ *Id.* § 78m(b)(2)(B).

⁵⁴ U.S. SENTENCING GUIDELINES MANUAL § 8C2.6 (2011).

law.”⁵⁵ The detection of a violation, however, does not necessarily show that the program was ineffective.⁵⁶

The Organizational Guidelines require continual monitoring of the compliance procedures, an obligation placed on the “governing authority” of the corporation to “be knowledgeable about the content and operation of the compliance and ethics program and . . . exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.”⁵⁷ The program should include regular training of employees,⁵⁸ and the creation and dissemination of “a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.”⁵⁹ In addition to a compliance program, cooperation with the government and acceptance of responsibility for wrongdoing are important steps that can mitigate substantially a penalty.⁶⁰

⁵⁵ *Id.* § 8B2.1(a). The emphasis on compliance programs and the resultant cooperation in a government investigation has been criticized. See Lindsay K. Eastman, Note, *Revising the Organizational Sentencing Guidelines to Eliminate the Focus on Compliance Programs and Cooperation in Determining Corporate Sentence Mitigation*, 94 MINN. L. REV. 1620, 1637 (2010) (“The policy of offering sentence mitigation to encourage cooperation derogates the rights of corporations and their employees, and does not promote the [Organizational Guidelines’] goals of preventing and deterring organizational crime.”).

⁵⁶ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2011) (“The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.”).

⁵⁷ *Id.* § 8B2.1(b)(2)(A).

⁵⁸ The Organizational Guidelines provide that:

The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities.

Id. § 8B2.1(b)(4)(A).

⁵⁹ *Id.* § 8B2.1(b)(5)(C).

⁶⁰ The greatest benefit comes if:

the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.

Id. § 8C2.5(g)(1).

C. State Corporate Law

A few years after the adoption of the Organizational Guidelines, the Delaware courts came to recognize the need for corporate officers and directors to take a more active role in ensuring compliance with the law. The traditional rule regarding a board's oversight responsibilities announced in 1963 in *Graham v. Allis-Chalmers Mfg. Co.*⁶¹ was that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."⁶²

The Delaware Chancery Court first moved away from that position in *In re Caremark International Inc. Derivative Litigation*,⁶³ which reoriented the basic fiduciary standard for directors that requires them to be informed about the company's compliance with applicable legal requirements. Chancellor William Allen wrote:

I am of the view that a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.⁶⁴

The Delaware Supreme Court endorsed and refined the *Caremark* analysis in *Stone ex. rel AmSouth Bancorporation v. Ritter*.⁶⁵ For a successful derivative claim against a director, a shareholder would have to show either a complete failure to create a reporting system or internal controls, or "having implemented such a system or controls, [directors] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."⁶⁶ This is a low standard for a director to meet, and a successful claim is more likely to come from a failure to act in response to reported problems because corporations reacted to *Caremark* by adopting much more extensive compliance programs.⁶⁷

⁶¹ 188 A.2d 125 (Del. 1963).

⁶² *Id.* at 130.

⁶³ 698 A.2d 959 (Del. Ch. 1996).

⁶⁴ *Id.* at 970.

⁶⁵ 911 A.2d 362 (Del. 2006).

⁶⁶ *Id.* at 370.

⁶⁷ See Peter J. Henning, *Board Dysfunction: Dealing with the Threat of Corporate Criminal Liability*, 77 U. CIN. L. REV. 585, 606 (2008) ("The first type of fiduciary breach is unlikely to occur if the company has moderately competent counsel—who has attended a CLE conference in the past decade or read about Enron. The second type of breach is the more likely source of claims against the board, it focuses less on what was done structurally and more about how the board operates after creation of the compliance program that fails to prevent misconduct.").

D. *The Federal Push for Corporate Compliance and Cooperation*

Federal prosecutors have focused on corporate cooperation as an important factor in determining whether charges would be filed against a company for a violation. More than any benefits provided under the Organizational Guidelines, the decision on whether to file charges is crucial to a corporation because avoiding an indictment or reaching a settlement that does not involve a guilty plea allows a company to escape many of the collateral consequences that accompany a criminal conviction. In the *Principles of Federal Prosecution of Business Organizations*, the Department of Justice states that “[i]n determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation’s timely and voluntary disclosure of wrongdoing and its cooperation with the government’s investigation may be relevant factors.”⁶⁸ In discussing the value of cooperation in FCPA cases, Assistant Attorney General Breuer emphasized the importance of self-reporting and assisting the government:

We take into account all the factors set forth in the *Principles of Federal Prosecution of Business Organizations*, and we consider the particular facts and circumstances of each individual case. But there is no doubt that a company that comes forward on its own will see a more favorable resolution than one that doesn’t.⁶⁹

If there was any question whether publicly traded companies needed to create compliance programs, passage of the Sarbanes-Oxley Act⁷⁰ in 2002 made it imperative that they do so. Section 404 of the Act requires publicly traded companies and their outside auditors to make an annual assessment of “the effectiveness of the internal control structure and procedures of the issuer for financial reporting.”⁷¹ A key consideration in any review of a corporation’s internal controls will be its system for preventing and detecting potentially illegal conduct within the organization. Thus, a company could not simply ignore the requirement to adopt a compliance program if it hoped to receive a clean audit opinion, and its effectiveness is tested annually by an outside auditor, so presumably it would need to be more than just window dressing.

⁶⁸ U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.700 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrn.htm#9-28.700. For a history of the Department of Justice’s approach to charging corporations, see Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 166–68 (2009).

⁶⁹ Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

⁷⁰ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, & 29 U.S.C.).

⁷¹ 15 U.S.C. § 7262(a)(2) (2006).

The Dodd-Frank Wall Street Reform and Consumer Protection Act created incentives for whistleblowers to report corporate wrongdoing directly to the SEC and other federal authorities by adopting a reward program that allows a person to receive at least ten percent, and as much as thirty percent, of any sanctions imposed on a company for a securities law violation when the total amount is over one million dollars.⁷² The FCPA is a particularly ripe target for whistleblowing because overseas bribery frequently involves multiple employees and faulty recordkeeping, the type of information that can lead to significant penalties and rewards for informants.

One argument against the new whistleblower program is that it creates an incentive for employees to bypass internal reporting systems that are a key feature of corporate compliance programs.⁷³ But the new program is unlikely to give companies a reason to scale back their compliance regimes because even more vigorous internal controls may help avoid the types of problems that can lead to a whistleblower report. In addition, the SEC rules implementing the program provide that in determining the amount of an award the whistleblower's use of an internal reporting system may be a factor supporting an increase in the payment.⁷⁴ Even if employees may avoid reporting violations internally, a company must maintain its compliance program to encourage them to first report to management so that it can continue to receive the benefits provided under the Organizational Guidelines and the Department of Justice's charging policy for business organizations.⁷⁵

III. CORPORATE CRIMINAL LIABILITY AND THE COMPLIANCE DEFENSE

A corporation can be held criminally liable based on the tort doctrine of respondeat superior, which holds the organization vicariously responsible for the wrongdoing of its employees or agents acting within the scope of their employment when at least one aspect of the conduct was to benefit the

⁷² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78u-6 (2006)).

⁷³ See Shannon Kay Quigley, *Whistleblower Tug-of-War: Corporate Attempts to Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, 52 SANTA CLARA L. REV. 255, 257 (2012) ("Corporations are still required to maintain the internal reporting mechanisms and compliance programs required by the Sarbanes-Oxley Act, even though the monetary incentives provided by the Dodd-Frank Act undermine the purpose of such programs.").

⁷⁴ 17 C.F.R. § 240.21F-6(a)(4) (2012) ("The Commission will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems.").

⁷⁵ Quigley, *supra* note 73, at 289 ("Despite some drawbacks and uncertainties concerning the Dodd-Frank Act, its potential success through the creation of enticing incentives and significant retaliatory protections suggests that corporations must remodel their compliance programs to ensure employees utilize internal reporting mechanisms.").

company, even if it does not actually receive that benefit.⁷⁶ Indeed, this is sometimes referred to as strict liability for the corporation,⁷⁷ although that is not completely accurate because the offense may have an intent element that is proven against the organization by imputing an employee's *mens rea* to it. It is widely acknowledged that even the strongest compliance program cannot stop an individual from violating the law, so that a company can be held responsible despite its best efforts to prevent a crime and comply with the law. As Professor Bucy pointed out, "Courts deem criminal conduct to be 'within the scope of employment' even if the conduct was specifically forbidden by a corporate policy and the corporation made good faith efforts to prevent the crime."⁷⁸

The specter of the so-called "rogue" employee is the bugaboo of corporate criminal liability—the individual who can bring down an otherwise innocent organization through actions viewed as abhorrent by corporate management.⁷⁹ Preet Bharara, before his appointment as the United States Attorney for the Southern District of New York, described the potential for corporate liability this way:

[A] multinational corporation may theoretically be indicted, convicted, and perhaps put out of business based on the alleged criminal activity of a single,

⁷⁶ N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909) ("Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises."); see also Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L.J. 1215, 1220 (2003) ("Liability attaches regardless of whether the agent was a line employee or the chief executive officer, and applies to both civil and criminal liability for corporations in the United States. Thus, any corporate agent's behavior could trigger liability for the corporation and for that agent.").

⁷⁷ See Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 412 (2007) ("The legal system should not impose criminal liability, as distinct from civil liability, on a corporation anytime an employee commits a crime within the scope of employment that is intended by the employee to benefit the company in whole or in part. Such a system of strict liability for a corporation, while often warranted and in tune with the goals of civil liability, has no place in the criminal law.").

⁷⁸ Bucy, *supra* note 32, at 1102.

⁷⁹ For example, Kweku M. Adoboli was a trader with the London office of Swiss bank UBS accused of fraud and false accounting for unauthorized trades that resulted in a \$2.3 billion loss. See Julia Werdigier, *Prosecutor Reveals Details of UBS Rogue Trading Case*, N.Y. TIMES DEALBOOK (Oct. 20, 2011, 8:09 AM), available at <http://dealbook.nytimes.com/2011/10/20/prosecutor-reveals-details-of-ubs-rogue-trading-case/>. Because he was ostensibly acting for the benefit of UBS, the bank could be charged with a crime under a respondeat superior theory of liability if the conduct took place in the United States, even though the bank suffered the loss. See Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 281 (2008) ("[U]nder the existing regime of enterprise liability, a business entity can unravel even for the misdeeds of a single, low-level rogue employee.").

low-level, rogue employee who was acting without the knowledge of any executive or director, in violation of well-publicized procedures, practices, and instructions of the company. And the corporation's conviction will stand even if the rogue worker is himself acquitted of wrongdoing.⁸⁰

The problem with this approach to corporate liability, as former Deputy Attorney General Larry D. Thompson put it, is that “[w]hen you explain to lay people that the corporation can be held responsible for the acts of rogue employees, even if their behavior contravened corporate policies, most people just don’t understand. They see it as unfair. And they are right, so we need to address this.”⁸¹

It is the fear of the miscreant employee, sometimes portrayed as a mere minion in a vast organization,⁸² whose actions trigger the perceived unfairness that seems to be the driver of the arguments in favor of a compliance defense.⁸³ For example, Mr. Mukasey asserted that “[i]t is inherently unfair to impose liability for the acts of rogue employees on a company that had in place a robust FCPA compliance program designed to prevent such acts.”⁸⁴ Under this analysis, the rogue employee problem could be largely negated while providing

⁸⁰ Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 65 (2007).

⁸¹ Larry D. Thompson, *The Blameless Corporation*, 47 AM. CRIM. L. REV. 1251, 1252 (2010).

⁸² There is no definition of the “rogue” employee, and the term can be used as a way for a corporation to try to avoid the consequences of the misconduct of employees who are acting in a way consonant with the organization’s culture. See Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343, 1350 (2007) (“Bad apples, in fact, are not always rogue employees off on a frolic of their own.”); see also Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL’Y 1, 5–6 (2010) (“One should note, however, that many of the cases that make the morning papers and evening news are not mere ‘rogue employee’ cases. Rather, multiple actors appear to bear varying levels of culpability for indirect encouragement or lax oversight of violations of law.”); Ashley S. Kircher, Note, *Corporate Criminal Liability Versus Corporate Securities Fraud Liability: Analyzing the Divergence in Standards of Culpability*, 46 AM. CRIM. L. REV. 157, 160 (2009) (“Under the respondeat superior standard, all individuals who work in a corporation are considered its agents, and thus, the corporation is always criminally liable, even if the offense is committed by those located at the lowest levels of the organization.”).

⁸³ The Department of Justice recognizes the potential for a rogue employee in the Principles of Federal Prosecution of Business Organizations, noting that “it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.” U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.500 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrmm.htm#9-28.500. Note that the conduct of the rogue employee only “may” not support a decision to prosecute, which means prosecution remains a possibility.

⁸⁴ *Mukasey Testimony*, *supra* note 19, at 6.

significant benefits to both the organization and the broader criminal justice system if corporate criminal liability were limited. Indeed, Mr. Mukasey argued that adopting the new defense “will increase compliance with the FCPA by providing businesses with an incentive to develop and enforce strong compliance programs.”⁸⁵ The equation seems to be that potentially less enforcement will result in fewer violations—subtraction by subtraction.

Arguments in favor of a compliance defense for corporations premised on avoiding the impact of the rogue employee rely to varying degrees on three rationales: (1) the need to create incentives for organizations to maintain effective compliance programs by receiving a reward for a diligent effort rather than punished because of the acts of a lone wayward employee;⁸⁶ (2) the disproportionate advantage the respondeat superior theory of criminal liability affords prosecutors to hold a company criminally liable for conduct that could not have been prevented otherwise; and (3) the need to link corporate punishment to traditional notions of moral responsibility in the criminal law that are lost under a regime of vicarious liability. Each rationale is premised on avoiding, or at least limiting, the unfairness linked to the rogue employee who can trigger significant harm to the organization that may extend far beyond the impact of the violation.

In this section, I will review the main features of the various suggestions for a defense specific to organizations based on a company’s compliance program.

A. *Due Diligence Defense*

Long before the enactment of the FCPA, the drafters of the Model Penal Code limited the offenses for which corporations could be prosecuted, and provided a “due diligence” defense for those crimes that could result in a conviction for an organization. Section 2.07(1) confined prosecutions of corporations to regulatory offenses in which the legislative intent “plainly” appeared to allow for respondeat superior liability, when the crime resulted from an omission involving “a specific duty of affirmative performance imposed on a corporation,” or the “commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by” the directors or a “high managerial agent” of the company.⁸⁷ Some members of the American Law Institute involved in drafting the Model Penal Code viewed the notion of

⁸⁵ *Id.*

⁸⁶ *See, e.g.,* Hamdani & Klement, *supra* note 79, at 277 (“Under a regime of unlimited liability, each partner could suffer a severe financial penalty even for wrongdoing by a single, rogue member of the firm. In modern, large professional firms—where members cannot fully eliminate wrongdoing—subjecting members to such potential liability might dilute their incentives to refrain from wrongdoing.”).

⁸⁷ MODEL PENAL CODE § 2.07(1)(a)–(c) (1985).

corporate criminal liability skeptically, so the provision was designed to allow for such prosecution in only limited circumstances.⁸⁸

The Model Penal Code then provided in section 2.07(5) an affirmative defense to any charge, except one brought under a strict liability provision, “if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.”⁸⁹ A “high managerial agent” is an officer of a corporation or other type of business organization, or an agent “having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the” entity.⁹⁰ The focus of the defense is on whether a senior member of the corporate chain of command took steps to prevent lower-level employees from engaging in misconduct, which would absolve the corporation of criminal liability. As Professor Kathleen Brickey noted, the effect is that “[t]he due diligence defense transforms a legislative directive (‘Do this’ or ‘Don’t do this’) into a request (‘Try to do this’ or ‘Do all that you reasonably can’).”⁹¹ As an affirmative defense, the corporate defendant bears the burden of proving it by a preponderance of the evidence.⁹²

The focus on a “high managerial agent” reflects a view of a corporation as a straightforward vertically integrated organization in which it is easy to trace responsibility for conduct from a lower-level worker to a member of senior management whose oversight of employees can be assessed to determine whether “due diligence” was in fact exercised. Whether that’s how corporations existed in the 1950s when the Code was drafted—and I think it was unlikely even then—it is not how multinational companies operate today, with layers of management and different lines of responsibility that often cut across product and geographical lines.

The due diligence defense also can be understood as creating an incentive to delegate authority to lower-level agents without necessarily providing for

⁸⁸ See Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 595–96 (1988) (“Professor Glanville Williams, one of the chief skeptics at the 1956 meeting, attributed his lack of enthusiasm to a belief that the effort to codify corporate responsibility unwisely followed the courts’ example of leaping before you look. Joining this criticism, Professor Gerhard Mueller also thought the idea of codifying a doctrine of corporate liability had little to recommend it.” (footnotes omitted)). This skepticism led to a rather parsimonious view of corporate prosecutions, and Professor Brickey pointed out that section 2.07(1) reflects “the more charitable view that if we must tolerate corporate criminal liability at all, we should tolerate precious little of it.” *Id.* at 629.

⁸⁹ MODEL PENAL CODE § 2.07(5). The defense is also not available “if it is plainly inconsistent with the legislative purpose in defining the particular offense.” *Id.* This puts the onus on the legislature to remove the due diligence defense, otherwise it applies in any case in which the corporation can be held liable.

⁹⁰ *Id.* § 2.07(4)(c).

⁹¹ Brickey, *supra* note 88, at 597 n.22.

⁹² MODEL PENAL CODE § 2.07(5). The defense may not be available “if it is plainly inconsistent with the legislative purpose in defining the particular offense.” *Id.*

adequate oversight by senior management as a means to avoid corporate criminal liability.⁹³ Even a weak compliance program might be enough to shield a company from liability so long as a high managerial agent expended enough effort to meet the standard of due diligence, a term that is not defined in the Model Penal Code. The defense essentially pits the high managerial agent against the miscreant employee(s) and asks the jury to assess the conduct of each to decide whether the latter is more deserving of approbation than the former. If the senior manager did enough to supervise the employee, then the corporation is absolved of liability for the conduct, but if not, then the organization is held responsible, even though in either circumstance the harm from the violation occurred.⁹⁴ In effect, the company's liability depends on which employee is a better representative of the corporation. This can be a means of protecting against the rogue employee, so long as the "high managerial agent" supervising that person took at least some steps to prevent the violation⁹⁵—although a true rogue is unlikely to be detected in advance, so it is not clear how the due diligence of the supervisor would be established.

The American Law Institute approved the Model Penal Code in 1962,⁹⁶ long before there were corporate compliance programs of the sort now in place in any sizeable company. So the focus on the conduct of particular officers and managers who exercised due diligence as the sole basis for establishing the defense was understandable—there was nothing else available to limit the liability of the organization. The impact of the provision has been minimal, however, because only six states have explicitly adopted the due diligence defense in section 2.07(5).⁹⁷ More importantly, the federal government never

⁹³ See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1371 (1999) ("Surely, some rational corporations will find less of an incentive to fashion effective compliance programs as their liability will be excused regardless of the success of compliance efforts.").

⁹⁴ See Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252, 1278 (1996) ("[T]he due diligence approach requires the factfinder to hold inconsistent views about the locus of corporate action and corporate intent. . . . Asking the jury to think simultaneously both that a corporation acts solely through its employees and that it acts independently of those employees invites confusion over whose acts constitute corporate acts.").

⁹⁵ See Joan-Alice M. Burn, *United States v. Stein: Has the "Perfect Storm" Led to A Sea Change?*, 32 DEL. J. CORP. L. 859, 876 (2007) ("Adoption of these provisions of the Model Penal Code at the federal level would make it more difficult to indict a corporation because it would require something more than the criminal act of a rogue employee that happens to benefit the corporation in some way.").

⁹⁶ See MODEL PENAL CODE (Official Draft and Revised Comments 1962).

⁹⁷ See Brickey, *supra* note 88, at 630 ("No more than six of the twenty-one states that have adopted [§ 2.07](1)(a) analogs recognize a due diligence defense to (1)(a) liability, moreover."). For a review of state rules on corporate criminal liability and available defenses, see Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 124–42 (2006).

adopted the provisions of the Model Penal Code, and most high profile criminal prosecutions of publicly traded companies, particularly for overseas conduct, have been pursued by the Department of Justice rather than by state prosecutors.⁹⁸

To make the defense more responsive to changes in how corporations approach compliance, the Harvard Law Review in 1979 suggested a modified due diligence defense that focused on the effectiveness of a corporate program to prevent and detect violations rather than the conduct of individual supervisors.⁹⁹ Under this approach, a corporation could rebut a finding of liability based on respondeat superior “by proving by a preponderance of the evidence that it, as an organization, exercised due diligence to prevent the crime.”¹⁰⁰ Similarly, Harvey Pitt and Karl Groskaufmanis proposed modifying the Model Penal Code approach by “[s]hifting the standard of review to the company’s shop floor” to allow a due diligence defense “[i]f a diligent effort was made to develop a policy, inform the employees, and enforce the policy”¹⁰¹

There was an effort in the House of Representatives to add a due diligence defense to the FCPA as part of the 1988 amendments to the law that combined the presence of a compliance program with the due diligence of the supervisor

⁹⁸In *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946), the Sixth Circuit held that a corporation could not be prosecuted for the acts of a salesman who contravened specific instructions regarding conduct that violated a wartime provision. According to the circuit court:

[T]he unlawful action of Boyd in procuring delivery of a new furnace to Bowen has been shown, with no evidence to the contrary, to have been, not only without the knowledge of the appellant corporation of his illegal conduct, but also in express violation of its specific instructions to him and to all its agents. In these circumstances, the conviction of the corporation should not be upheld.

Id. at 8. Other federal courts have rejected this approach, and the Ninth Circuit, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), specifically held that a corporation was liable for the conduct of an employee who violated a specific corporate directive not to participate in the type of activity that led to an antitrust violation. The circuit court explained that a company “could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks.” *Id.* at 1007.

⁹⁹*Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1254 (1979) (“Since an executive cannot authorize or recklessly tolerate an offense unless he knows about it, a corporation can escape liability under this system as long as high officials remain ignorant of illegal activity. Superiors can preserve their ignorance by conveying to employees the understanding that they do not wish to be told of information which may subject the corporation to liability.” (footnote omitted)).

¹⁰⁰*Id.* at 1257.

¹⁰¹Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1648 (1990).

responsible for the employee who engaged in the foreign bribery.¹⁰² According to a House Conference Report, “a firm could not be held vicariously liable for such violations if it had established procedures ‘reasonabl[y] expected to prevent and detect’ any such violation, and the officer and employee with supervisory responsibility for the offending employee’s or agent’s conduct used ‘due diligence’ to prevent the violation.”¹⁰³ The Senate version of the bill did not have a similar provision, and the House dropped its position as part of the final passage of the legislation.

These suggestions for a modified due diligence defense were made before the shift toward widespread adoption of compliance programs in the 1990s. They continued to rely on the Model Penal Code focus on the conduct of individual corporate officials while overcoming the perceived weakness in the due diligence defense that made corporate criminal liability hinge on the conduct of at most a few corporate managers with supervisory responsibility over the employee responsible for violations. The advent of corporate compliance programs, even though they were largely in a nascent stage in the late 1980s, was thought to be a better proxy for due diligence than the actions of a single “high managerial agent” to assess whether a company should be completely relieved of liability. With the push toward more robust compliance programs fostered by subsequent changes at the federal and state levels, as discussed above, the notion of a compliance defense to corporate criminal liability shifted the focus away from the acts of individual officers to how the corporation itself had developed and implemented measures to protect against misconduct as the basis for avoiding corporate criminal liability.

B. *Forms of a Compliance Defense*

Most proposals for a compliance defense would apply it in any prosecution of an organization. The FCPA is a particularly apt candidate for application of the defense because internal corporate controls in larger companies focus on maintaining accurate books and records of business transactions, and overseas bribery is ripe for false reports that hide the true nature of illicit payments to foreign officials—no one has a line item for bribes and gratuities. The scope of the FCPA’s bribery prohibition is fairly clear for the most part, and the payments must be for the purpose of obtaining or retaining business for the corporation, so there is rarely an issue in these cases about whether the organization can be held liable under the respondeat superior theory for conduct by an employee or overseas agent. The proposals for a compliance defense have

¹⁰² Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 632 [hereinafter *Compliance Defense*] (quoting Export Enhancement Act of 1986, H.R. 4708, 100th Cong. (1988)). Under the proposed compliance defense in the bill, a company would have to establish procedures “which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such employee.” *Id.*

¹⁰³ H.R. REP. NO. 100-76, at 922 (1988), *reprinted in* 1988 U.S.C.A.N. 1547, 1955.

different attributes, some offering it as an affirmative defense, like the due diligence defense in the Model Penal Code, while others would allow evidence of the compliance program to effectively negate proof of a company's intent to violate the law. One suggestion would add an element to any charge against a corporation requiring proof that a corporate defendant's compliance program was ineffective. Any of these approaches could be added as an amendment to the FCPA to create the first general federal defense to corporate criminal liability based on an organization's particular attributes rather than looking solely at the intentions and conduct of its employee.

1. *The Affirmative Defense*

Charles Walsh and Alissa Pyrich were among the first to propose a compliance defense that did not incorporate the Model Penal Code's due diligence approach focusing on the conduct of senior management in overseeing the employee who committed the violation.¹⁰⁴ Their proposal provided that "an effective, adequately functioning corporate compliance program should rebut the presumption that agents' criminal acts within the context of their employment are attributable to the corporation."¹⁰⁵ The company would bear the burden of persuasion by a preponderance of the evidence "that it has implemented a practical, functioning program related to the field in which the violation occurred" to avoid criminal liability.¹⁰⁶ The rationale for the defense was based on fairness, that "[w]hen a corporation is convicted despite reasonable and diligent measures to prevent wrongdoing, the moral sting of the criminal penalty is diminished by an underlying sense of unfairness."¹⁰⁷

James R. Doty, the former general counsel at the SEC and current chair of the Public Company Accounting Oversight Board, suggested a new "Reg. FCPA" creating a "regulatory safe harbor," which is akin to an affirmative defense, for companies that meet its requirement to create and publicly disclose the elements of the corporate compliance program. To avoid liability for an FCPA violation,

¹⁰⁴ Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 *RUTGERS L. REV.* 605, 676–90 (1995).

¹⁰⁵ *Id.* at 676.

¹⁰⁶ *Id.* at 684–85.

¹⁰⁷ *Id.* at 677–78. Professor H. Lowell Brown offered a similar rationale for recognizing compliance efforts as a defense to vicarious corporate criminal liability, arguing that "the potential for relief from otherwise draconian and possibly life threatening liability for the corporation certainly provides a strong incentive to commit resources to compliance." H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 *LOY. L. REV.* 279, 325 (1995).

A claimant would thus be required to show, not only that it had established an FCPA Compliance Program, but also that it had reasonably implemented the program and reasonably believed that the requirements of the safe harbor were met. Upon satisfying these conditions, the company would be presumed not to have violated the statute. This presumption could be rebutted by a preponderance of the evidence.¹⁰⁸

Under this approach, a showing that the regulatory requirements had been met would preclude a finding of a violation as a matter of law, so that it would operate more as a type of immunity than a more typical criminal defense, which is a factual issue to be resolved at trial.¹⁰⁹ Thus, the question of whether the case could proceed would be decided by the court on a motion to dismiss an indictment or civil enforcement action rather than by a jury weighing the effectiveness of the compliance effort. The rationale for the safe harbor is that it would lead to “increased compliance because the rulemaking will cause the sharing of procedures and process by registrants, and, ultimately, result in a more robust interpretive process and greater guidance and predictability for U.S. companies that seek to comply with the requirements of the statute.”¹¹⁰ Mr. Doty noted, “[T]he government *owes* consistency and predictability to public corporations attempting to accomplish complex tasks in difficult foreign venues, and to management and directors who want to know the ‘how-to-do-it’ of compliance in these circumstances.”¹¹¹

Former Deputy Attorney General Thompson proposed a compliance defense that would require a company to give pretrial notice that it intended to raise the issue, and then the judge would have to decide at that point whether it had a “bona fide” program in place.¹¹² If so, then the court would grant a

¹⁰⁸James R. Doty, *Toward A Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1245 (2007).

¹⁰⁹The presumption would be similar to the protections afforded by an Attorney General opinion issued under the FCPA. 15 U.S.C. § 78dd-1(e) (2006). Under that provision, if an opinion is offered, it creates a rebuttable presumption that the conduct described in the opinion was in compliance with the law. *Id.* If the Department of Justice pursues a violation for that conduct, then:

In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General.

Id. The impact of the presumption is an issue of law to be decided by the court and not a factual question for the jury.

¹¹⁰Doty, *supra* note 108, at 1248.

¹¹¹*Id.* at 1239.

¹¹²Thompson, *supra* note 81, at 1326 (“If the compliance program indeed is a bona fide compliance program, there is the possibility that the corporation could get a Rule 29 judgment of acquittal and you don’t have to go to trial and you don’t have to submit yourself to a jury trial.”).

motion for a judgment of acquittal because the presence of a compliance program meant “[t]he innocence of the corporation would be established as a matter of law.”¹¹³ Unlike other approaches that would make evidence of the program a basis to avoid conviction at trial, like other criminal law defenses, under Mr. Thompson’s approach the corporation would be “innocent” of the charge, which means that it would bear no responsibility for the criminal offense.¹¹⁴ The reason offered for this approach focused on the disparate bargaining positions of the corporation and the prosecution, so that “[t]his provision I think is one further step in leveling the playing field between a corporate target of a government investigation and the government. Because, quite frankly, the way the game is played today, the playing field is unfairly tilted in favor of the government.”¹¹⁵

Professor Koehler also argued in favor of a compliance defense on the ground that “the current FCPA enforcement environment does not adequately recognize a company’s good-faith commitment to FCPA compliance and does not provide good corporate citizens a sufficient return on their compliance investments.”¹¹⁶ Limiting consideration of corporate compliance to the prosecutor’s discretion to decide whether to charge a company or to the court at sentencing to determine the appropriate fine, only represented “baby carrots,” while “what is needed to better incentivize more robust FCPA compliance are real ‘carrots,’” i.e., a compliance defense.¹¹⁷ He also pointed to the United Kingdom’s recently enacted Bribery Act, which specifically incorporates a compliance defense, as support for amending the FCPA to include a similar

¹¹³ *Id.* at 1326–27.

¹¹⁴ *Id.* It is not clear whether the judicial finding would also preclude civil liability for a violation. Presumably a finding of “innocence” rather than “not guilty” would mean the corporation acted properly, so that it could not be accused in a civil or regulatory proceeding.

¹¹⁵ *Id.* at 1327.

¹¹⁶ *Compliance Defense*, *supra* note 102, at 610–11. Describing “compliance investments” as providing a “sufficient return” reflects the monetization of compliance as a function of a cost-benefit analysis by corporations that want to receive a tangible benefit for any expenditure. Compliance is certainly a significant cost to be borne by a company, but whether its benefit is measured primarily in reduced fines or a decision not to charge may overlook the greater social benefit from following the law that cannot be measured so easily.

¹¹⁷ *Id.* at 655. There is evidence that “real carrots” may already be available in how the Department of Justice chooses to resolve cases in which a company self-reports violations, which requires a strong compliance program already be in place. See Sarah Marberg, Note, *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 VAND. J. TRANSNAT’L L. 557, 583 (2012) (“[N]early all non-prosecution agreements entered into by the Department of Justice between 2002 and the present—and all non-prosecution agreements after 2007—involved a company that had voluntarily disclosed a potential violation of the FCPA and cooperated in the subsequent investigation.”).

protection for corporations.¹¹⁸ Under the British law, a company can avoid liability for paying any type of bribe if, at the time of the payment, it “had in place adequate procedures designed to prevent persons associated with [the commercial organization] from undertaking such conduct.”¹¹⁹ Of course, whether companies need further incentives to comply with the law is an open question, unless the analysis is simply one of costs and benefits, at which point the greater incentive may be to simply forego a compliance program rather than spending money on such for an unquantifiable benefit—but no one would argue for that, I suspect.

2. *Good Faith*

Professor Ellen Podgor argued in favor of a compliance defense that focused on the company’s “good faith efforts” to prevent the violation.¹²⁰ Under this approach, “an affirmative defense should be offered to those who present ‘good faith’ efforts to achieve compliance with the law as demonstrated in their corporate compliance program.”¹²¹ Good faith is usually limited to specific intent crimes, like larceny and fraud, and operates in those cases to negate the government’s proof of the mens rea element of the offense rather than as a defense to a crime, like self-defense or duress.¹²² So compliance would not be a

¹¹⁸ *Compliance Defense*, *supra* note 102, at 636 (“[S]everal countries have a compliance-like defense relevant to their ‘FCPA-like’ law. Included in this group is the United Kingdom’s recently enacted Bribery Act, a law hailed as even more stringent than the FCPA.”).

¹¹⁹ Bribery Act, 2010, c. 23, § 7(2) (U.K.). Mr. Mukasey’s proposed compliance defense cites to the Bribery Act as support for incorporating one in the FCPA, along with a provision of Italian law that permits a company to avoid liability if it had in place a program designed to prevent criminal conduct. *Mukasey Testimony*, *supra* note 19, at 4. The Bribery Act is broader than the FCPA, however, covering any improper payment, not just those made to an overseas official. The recommendation to use the British law as a guide has not included incorporating its more encompassing definition of the violation.

¹²⁰ Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1543 (2007) (“Providing a ‘good faith’ affirmative defense to corporations that have acted in accordance with the law in structuring, overseeing, and maintaining their compliance programs will offer an additional incentive to corporations to promote these programs.”).

¹²¹ *Id.* at 1538.

¹²² See *United States v. Bohn*, 622 F.3d 1129, 1138 (9th Cir. 2010) (“[A] defendant’s good faith may be an affirmative defense against a specific intent crime, but not against a general intent crime.”); *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985) (“[F]raudulent intent is an essential element of the crimes for which appellants were convicted. Good faith constitutes a complete defense to such specific intent crimes.”); *United States v. Sherer*, 653 F.2d 334, 338 (8th Cir. 1981) (“The essence of a good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring fraudulent intent.”).

defense so much as a means to dispute the government's proof of liability, effectively importing a separate corporate intent element into the offense.

The compliance defenses offered by other commentators is not so limited, and appear to work best with crimes that require proof of a minimal intent, such as negligence, or even strict liability because proof of the crime requires such a low threshold of evidence that any measures undertaken by a defendant to comply with the law would be irrelevant. The focus on good faith, on the other hand, links the crime to proof of a corporation's intent apart from that of its employees and agents, and arguably makes the defense more attuned to showing the organization's mens rea rather than as a separate basis to absolve the organization of liability.

3. *Compliance as an Element of the Offense*

Andrew Weissmann, a former director of the Department of Justice's Enron Task Force, offered the most far-reaching form of compliance defense. Rather than putting the onus on the defendant to prove by a preponderance of the evidence that the company had in place an effective compliance program, he argued, "[T]he government should bear the burden of establishing as an additional element that the corporation failed to have reasonably effective policies and procedures to prevent the conduct."¹²³ Under this approach, the prosecution would have to prove beyond a reasonable doubt that a company did not have a compliance program in place, otherwise the jury would have to return a "not guilty" verdict. He asserted that "[i]f criminal liability hinged on whether or not effective measures are in place, corporations would have a powerful new incentive to implement such policies and procedures and to monitor them assiduously as a shield from criminal exposure if an employee nevertheless commits a crime."¹²⁴

This approach would make it considerably more difficult to establish corporate criminal liability because failing to introduce sufficient evidence to show the *ineffectiveness* of a compliance program would mean a company should be acquitted of the offense even if its program had significant shortcomings but was at least marginally effective. To put the burden on the corporation would be unfair, according to Mr. Weissmann, because it "gives the government a presumption that the corporation has failed to act and undercuts the reasons for corporate criminal liability."¹²⁵ Linking the presence of an effective compliance program with establishing a separate corporate intent reflects the approach taken by Professor Bucy when she argued that corporate

¹²³ Weissmann, *supra* note 77, at 414. The article does not explain how this would be accomplished. It would in all likelihood require a statute, similar to Model Penal Code § 2.07, outlining what would constitute an effective compliance program and whether it applied to every prosecution of an organization or just for certain offenses.

¹²⁴ *Id.*

¹²⁵ *Id.* at 450.

criminal liability should depend on proving the organization had a “corporate ethos” that encouraged criminal conduct by its agents.¹²⁶ Mr. Weissmann analogized requiring the government to prove the absence of an effective compliance program to the insanity defense, focusing on the unfairness of imposing liability on an organization that is not morally culpable.¹²⁷ This centers the proposal on the traditional criminal law notion that punishment should only be imposed on an individual who is morally blameworthy, which is impossible to establish for an organization that—in the words of the Lord Chancellor—“has no soul to be damned, and no body to be kicked.”¹²⁸

Mr. Weissmann offered two additional justifications for shifting the burden to the government to show the absence of an effective compliance program as an element of any offense. The first was one seen in other proposals; that this would give companies a powerful incentive to put resources into creating a mechanism to prevent and detect violations by employees.¹²⁹ That rationale may falter if the government bears the burden of proving the ineffectiveness of a compliance program because corporations will have an incentive to expend only enough resources to avoid such a finding, which may result in reducing expenditures for compliance. One way around this would be if the standard of what is an “effective” program is kept sufficiently vague so that companies cannot know *ex ante* how much is enough, increasing the likelihood that they will expend too many resources because of their natural risk aversion. That

¹²⁶ Bucy, *supra* note 32, at 1121. Under the “corporate ethos” standard, “the factfinder is less likely to hold criminally liable a corporation that has implemented viable educational programs than a corporation that has no such programs.” *Id.* at 1135.

¹²⁷ Weissmann, *supra* note 77, at 430 (“It is commonplace that the criminal law’s moral basis is called into question whenever individuals with no practical ability to comply with its obligations are punished for their actions. Indeed, this is one of the most basic tenets of modern theories of the insanity defense, and its logic is instructive in the corporate criminal context.”). The analogy to insanity may be a faulty one, however, because proof of a defendant’s sanity is not necessarily an element of the government’s case, as proposed for ineffective compliance as a prerequisite for corporate criminal liability. For example, under the federal Insanity Defense Act, 18 U.S.C. § 17 (2006), the defendant bears the burden of proving insanity by clear and convincing evidence.

¹²⁸ See John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (1981) (quoting Edward, First Baron Thurlow, Lord Chancellor of England). Interestingly, Republican presidential candidate Mitt Romney may have inadvertently made the opposite point when he responded to a heckler by stating that “[c]orporations are people, my friend.” Philip Rucker, *Mitt Romney Says ‘Corporations Are People’ at Iowa State Fair*, WASH. POST, Aug. 11, 2011, http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQAByZ381_story.html. It is unlikely he meant to equate organizations with human beings.

¹²⁹ Weissmann, *supra* note 77, at 433 (“That incentive would be all the greater, however, where the establishment of an effective compliance program would serve to shield the company from criminal prosecution and the vagaries of individual criminal prosecutors.”).

seems like an inefficient, and unfair, way to ensure that companies put in place effective compliance programs.

The second justification was an instrumental one, that requiring the government to prove the program was effective “will also serve to correct an imbalance in power between the government and a corporation facing possible prosecution for the action of an errant employee.”¹³⁰ According to Mr. Weissmann, “[N]o *systemic* checks effectively restrict the government’s power to go after a blameless corporation,” so that “the new standard will provide a systemic check on the power of the overly aggressive, ill-informed, or even unethical prosecutor.”¹³¹ The specter of the “powerless”¹³² corporation facing the rapacious prosecutor is certainly an evocative one, although whether it reflects reality is a different question.¹³³ But the focus on the balance of power between the prosecutor and the organization gives direction for how focus on the compliance program fits in with other criminal law principles of liability, and what it would mean if it were invoked at a trial.

IV. THE PARAMETERS OF A COMPLIANCE DEFENSE

Proposals for a corporate compliance defense deal primarily with the rationales for giving organizations the means to resist charges but less on how the defense would operate in an actual investigation or prosecution. One criticism of the federal criminal law is the tendency toward overcriminalization through vaguely worded statutes,¹³⁴ so it is fair to ask that a new defense meet

¹³⁰ *Id.* at 414.

¹³¹ *Id.*

¹³² *See id.* (“[T]he primary effect of the current system is to render the corporation unable to defend itself and thus powerless in its dealings with a prosecutor who may be misguided or worse.”).

¹³³ *See* Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1418–19 (2009) (“The demise of Arthur Andersen after its conviction in 2002 for obstruction of justice is often used to ‘prove’ the purported overwhelming power of prosecutors and the trembling fear of corporations who dare not risk going to trial under any circumstances lest they face near-certain destruction. However, there have been no other instances of a large firm suffering the same fate since then, even though other companies that have been charged with crimes and appear to have survived the ordeal, albeit quite a bit worse for wear.”).

¹³⁴ *See* Geraldine Szott Moolr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL’Y 685, 689 (2011) (“Carelessly drafted statutes lead to abuse of the criminal justice system. Criminal laws that are couched in broad, vague language invite the executive branch to argue, *ex post*, that an actor’s conduct violated the provision. Prosecutors offer a new interpretation of the statute, effectively asking courts to formulate a new type of crime.” (footnote omitted)); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing

the same standards of clarity and specificity that has been proposed for new criminal provisions.¹³⁵ Whether an organization should be able to avoid criminal liability because it has an effective program ostensibly designed to prevent and detect wrongdoing by employees is distinct from identifying the appropriate parameters of the defense, and how it is likely to be raised at trial and countered by prosecutors seeking a conviction. If we accept that adding a compliance defense to the FCPA is appropriate, then it is worth considering what such a defense would look like, how it relates to criminal law doctrines for avoiding liability, and the types of evidence that would be available to prosecutors seeking to refute a claim that a corporation had an effective program in place. In this Part, I discuss how these issues might play out if Congress were to add a compliance defense to the FCPA.

A. What Is an “Effective” Compliance Program?

Advocates for a compliance defense spend little time on what attributes will endow a program with sufficient efficacy to warrant allowing a company to avoid criminal liability. The compliance programs in effect in most corporations have only been around for about fifteen to twenty years, so earlier proposals like the Model Penal Code’s “due diligence” defense are of little aid in determining what constitutes an “effective” program.

A significant catalyst for developing compliance programs was the Organizational Guidelines. Section 8B2.1 provides a detailed description of what comprises an “effective compliance and ethics program”¹³⁶ that will allow

marginalization of judges, who alone are likely to opt for narrower liability rules rather than broad ones.”).

¹³⁵ See Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 645 (2006) (“To begin with the optimal, an effective and just system of penal laws should be: drafted by elected representatives to be as clear and explicit as possible so that citizens have fair notice of that which will subject them to criminal sanction; public; accessible; comprehensive; internally consistent; reasonably stable; rationally organized to avoid redundancy and ensure appropriate grading of offense seriousness; prospective only in application; and capable of uniform, nonarbitrary, and nondiscriminatory enforcement.”).

¹³⁶ The U.S. Sentencing Guidelines Manual provides:

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of § 8C2.5 (Culpability Score) and subsection (b)(1) of § 8D1.4 (Recommended Conditions of Probation—Organizations), an organization shall—
 - (1) exercise due diligence to prevent and detect criminal conduct; and
 - (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not

a company to seek a reduction in a recommended fine. Among the requirements for the compliance program are:

The organization shall take reasonable steps—

- (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
- (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
- (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.¹³⁷

The Organizational Guidelines commentary stresses that a larger corporation, which is often the type of company involved in an FCPA investigation, should “generally . . . devote more formal operations and greater resources in meeting the requirements of this guideline than . . . a small organization.”¹³⁸

In addition to an effective compliance program, the Organizational Guidelines also permit the reduction of an organization's fine based on its self-reporting, cooperation with a government investigation, and acceptance of responsibility.¹³⁹ The Principles of Federal Prosecution of Business Organizations similarly stress the value of cooperation even more than the presence of a compliance program in the assessment about whether a prosecutor should file charges against a corporation.¹⁴⁰

necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2011).

¹³⁷ *Id.* § 8B2.1(b)(5).

¹³⁸ *Id.* § 8B2.1 cmt. 2(C)(ii).

¹³⁹ *Id.* The U.S. Sentencing Guidelines Manual provides:

If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract [five] points . . .

U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (2011).

¹⁴⁰ U.S. DEP'T OF JUSTICE, *supra* note 68, § 28.700, provides:

In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the

Proposals for a compliance defense have largely ignored whether self-reporting and cooperation with a government investigation should be considered integral factors in evaluating the effectiveness of a program. If the defense is simply an application of the mitigation of criminal fines available under the Organizational Guidelines, then the requirement of cooperation should also be incorporated, especially if it will preclude liability rather than limit the punishment.

Nor do the proposals describe when a corporate program should be evaluated: at the time of the offense, when charges are filed, or when the question is put to the fact finder. The issue of timing is even more important if corporate cooperation is to be taken into consideration because that will occur months or even years after the violation. The Organizational Guideline's description of an effective compliance program provides that "[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program."¹⁴¹ If a company reported an overseas bribe to the Department of Justice before prosecutors became aware of the violation, this would be evidence establishing the efficacy of the program because the organization had successfully policed itself. Continued cooperation by sharing the results of an internal investigation with the government would further demonstrate the organization's commitment to high ethical standards.

To the extent prompt self-reporting and cooperation are relevant components in determining whether a company has an effective program, then a compliance defense is likely to take a back seat during an investigation. It will be something to be hinted at by corporate counsel but unlikely to be a significant part of a company's response to prosecutors, at least during the early phase of a case. The compliance defense would operate, to the extent it arises at all, as the last option for a company rather than a first line of resistance when an investigation commences. An organization would want to stress its willingness to work with prosecutors and investigators to resolve the case rather than discuss—or threaten—how it plans to defend charges in court, something it would rather avoid or at least mitigate.

Unlike most criminal law defenses, which may be raised at the outset of an investigation to dissuade a prosecutor from proceeding further or to argue in favor of a reduced charge, a compliance defense would seem to be one a company would hold in reserve. It would be brought out only if the relationship faltered or the prosecutor acted vindictively in pursuing charges despite corporate cooperation with the investigation. Even if provided with a compliance defense, it may be the last thing defense counsel wants to raise with

corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.

¹⁴¹ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(7).

the government if the company hopes to avoid charges or resolve a case expeditiously. Of course, lawyers are adept at balancing conflicting demands, and the compliance defense would require a rather delicate dance of showing cooperation with at least the veiled threat of offering the defense at trial if prosecutors are willing to proceed with criminal charges.

B. *What Type of Defense Is It?*

In the criminal law, most defenses fall into one of two common categories: justifications and excuses. Professor Joshua Dressler described the categories this way:

Although perhaps too simplistic, it generally is said that while “justification” speaks to the act, “excuse” focuses upon the actor. Justified conduct is external to the actor; excuses are internal. A justification implies that there is no need to excuse the actor; an excuse implies an earlier finding of lack of justification.¹⁴²

Professors Paul Robinson and John Darley explained that while both justifications and excuses exculpate a defendant, they operate in different ways to reach that result: “An actor pleading justification claims to have acted properly, that she did the right thing. An actor pleading excuse, such as insanity, duress, or involuntary conduct, admits that what she did was wrong, but claims that some characteristic or her condition leaves her blameless for the offense.”¹⁴³ The paradigmatic justification is self-defense, in which a person responding to unlawful force is permitted—and perhaps even encouraged—to resist with equal force, which may include deadly force if there is perceived a reasonable threat of death from the aggressor. On the other hand, an insane defendant does not claim the criminal conduct was permissible or socially beneficial, but that a mental impairment should preclude punishment in the particular circumstances by excusing the individual while not condoning the conduct.

¹⁴² Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 67 (1984). Professor Dressler pointed out further that “[s]urely there is a difference between conduct we approve of, or at least tolerate, and conduct that we condemn, even when we decide not to blame or punish the actor for the otherwise condemnable action.” Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongdoers*, 42 TEX. TECH L. REV. 247, 247 (2009) [hereinafter Dressler, *Very Modest Reflections*].

¹⁴³ Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1097 (1998); see also Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1903 (1984) (“If the law’s central distinction between justification and excuse is to follow ordinary usage, it will be drawn in terms of warranted and unwarranted behavior.”).

A compliance defense could be viewed as a type of excuse because the focus is on the actor—the organization—and not the act—overseas bribery—that is clearly wrongful. An effective corporate compliance program is a particular circumstance that should allow the company to avoid criminal responsibility for the conduct of its agent because it is not blameworthy, even if the individual agent is.¹⁴⁴ As Professor Donald Dripps pointed out, “Punishing the undeterrable inflicts pain to no purpose and is *prima facie* wrong.”¹⁴⁵ Professor Dressler expressed the view of excuses as being “about justice, not compassion.”¹⁴⁶

But categorizing a compliance defense this way does not work well because the types of legal excuses commonly recognized—such as duress, insanity, or involuntary intoxication—entail aberrant behavior of a defendant caused by a peculiar extrinsic condition. To say that an organization would be “excused” from liability because it implemented an effective compliance program is inconsistent with that analysis, implying that somehow the organization should not be held responsible for the conduct of its agent when in fact it wants to receive credit for what it did to prevent the violation and reported it to the authorities.

Professor Robinson identified another category into which a compliance defense would fit more comfortably: the nonexculpatory public policy defense.¹⁴⁷ Under this category, “nonexculpatory public policy concerns are at work whenever a dismissal is based on factors other than the innocence of the defendant.”¹⁴⁸ Among the nonexculpatory public policy defenses commonly available are the statute of limitations, diplomatic immunity, and in some instances, the operation of the exclusionary rule, which may preclude the prosecution from introducing probative evidence obtained in violation of a defendant’s constitutional rights. Professor Dressler explained that “Legislative recognition of such a defense implies that the social interest served by it outweighs the utilitarian and/or retributive reasons for punishing the offender.”¹⁴⁹

This category of defenses must be distinguished from a justification defense, which also advances society’s interests by encouraging certain

¹⁴⁴ See JEREMY HORDER, *EXCUSING CRIME* 8–9 (2004) (“[I]t is a necessary condition of any claim to excuse that it is an explanation for engagement in wrongdoing (an explanation not best understood as a justification, as a simple claim of involuntariness, or as an out-and-out denial of responsibility) that sheds such a favourable moral light on D’s conduct that it seems entirely wrong to convict, at least for the full offence.”).

¹⁴⁵ Donald A. Dripps, *Rehabilitating Bentham’s Theory of Excuses*, 42 TEX. TECH L. REV. 383, 384 (2009).

¹⁴⁶ Dressler, *Very Modest Reflections*, *supra* note 142, at 252.

¹⁴⁷ Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982) [hereinafter Robinson, *A Systematic Analysis*].

¹⁴⁸ *Id.* at 231.

¹⁴⁹ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 16.06, at 206 (6th ed. 2012).

behavior as beneficial. The defense is nonexculpatory, which means “the defendant’s conduct is harmful, and creates no societal benefit; the defendant is blameworthy.”¹⁵⁰ The law permits these to be offered at trial because “[t]he societal benefit underlying the defense arises not from his conduct, but from foregoing his conviction. The defendant escapes conviction in spite of his culpability.”¹⁵¹

The compliance defense appears to be almost a mirror image of entrapment, which is usually recognized as a nonexculpatory public policy defense.¹⁵² Each incorporates in some measure a focus on the actions of the government as encouraging conduct relevant to the offense as a basis for permitting the defendant to avoid liability for a violation.

There are two theories of entrapment: (1) the subjective form, which focuses on a defendant’s personal predisposition to commit the offense; and (2) an objective approach, which looks at whether a government agent overstepped the bounds of propriety in enticing the defendant to engage in criminal conduct. The Supreme Court adopted the subjective approach for federal prosecutions in *Sorrells v. United States*, holding that “[t]he predisposition and criminal design of the defendant are relevant.”¹⁵³ While the focus is on the defendant’s own mindset, the conduct of the government is relevant to determine whether it implanted the idea to commit the crime in an otherwise innocent defendant’s mind. In *Jacobson v. United States*, the Court stated, “In their zeal to enforce the law, however, [g]overnment agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the [g]overnment may prosecute.”¹⁵⁴ The Model Penal Code adopted the objective approach to entrapment, allowing a defendant to avoid conviction if the government induced or encouraged the commission of criminal conduct by “employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.”¹⁵⁵

The social policy supporting an entrapment defense is to deter governmental *misconduct*, while the compliance defense would be available because the government’s *conduct* has encouraged companies to invest in monitoring systems on the premise that their programs will prevent crime and lead more swiftly to prosecution when it does occur in an organization. Much like entrapment allows a defendant to avoid liability because the government

¹⁵⁰ Robinson, *A Systematic Analysis*, *supra* note 147, at 232.

¹⁵¹ *Id.*

¹⁵² See PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES § 209(b), at 513 (1984).

¹⁵³ 287 U.S. 435, 451 (1932). The defense was not constitutionally guaranteed, but instead was viewed as a component of all federal criminal statutes. The Court explained, “To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts.” *Id.* at 450.

¹⁵⁴ 503 U.S. 540, 548 (1992).

¹⁵⁵ MODEL PENAL CODE § 2.13(1)(b) (1985).

improperly planted the seeds of criminal conduct in the mind of the unwary, so too would a compliance defense reward those who responded to the government's mandate in the Organizational Guidelines and elsewhere to institute procedures to prevent and detect violations by employees. From the standpoint of deterring future misconduct, a compliance defense would allow a corporation to avoid liability when nothing further would be accomplished by punishing it for a crime that it could not have prevented.

The two defenses seek to vindicate public policy goals because it would be unfair to punish a defendant the government encouraged to act in a particular way by disregarding how the person responded to those entreaties.¹⁵⁶ Regarding entrapment, Professor Robinson noted that the defense "probably reflects a combination of concerns including an estoppel notion that it is unfair to permit the entity that has entrapped to then punish."¹⁵⁷ This analysis applies equally to the encouragement of companies to expend resources on their compliance programs, so the "estoppel notion" should permit an organization to rely on the compliance program to preclude punishment for a violation that could not reasonably have been prevented. This would be much like a successful entrapment defense, which means the violation would not have occurred but for the government misconduct.

When understood as analogous to entrapment, the contours of a compliance defense become clear. Entrapment is an affirmative defense in most jurisdictions, which assigns at least the burden of production to the defendant. The subjective entrapment defense puts the burden of persuasion on the government to prove predisposition to commit the crime once the defendant introduces sufficient evidence to raise the defense.¹⁵⁸ A court can conclude that a defendant was entrapped as a matter of law, resulting in dismissal of the charges or reversal of a conviction without an opportunity to retry the case.

¹⁵⁶ See Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 877 (2004) ("[B]eing targeted for entrapment is potentially burdensome because of the consequences. It is like being subjected to a tax or a taking that, while not punitive, is still oppressive. The only difference is that, rather than money or property, however, it is liberty that is being unjustly appropriated.").

¹⁵⁷ ROBINSON, *supra* note 152, at 516.

¹⁵⁸ See *United States v. Salmon*, 948 F.2d 776, 779 (D.C. Cir. 1991) ("[T]he defendant bears an initial burden of demonstrating inducement; once the defendant meets that burden, the ultimate burden of persuasion shifts to the government to prove predisposition."); *United States v. Hill*, 626 F.2d 1301, 1304 (5th Cir. 1980) (noting that once evidence of entrapment is introduced, "even if it arises from the prosecution's presentation, the ultimate burden of persuasion is on the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense"); Dillof, *supra* note 156, at 831-32 ("[A] defendant wishing to assert entrapment must first establish by a preponderance of the evidence that a government agent 'induced' him to commit the crime he is charged with. If he is unsuccessful, the defense fails. If the defendant is successful in carrying this burden of proof, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was 'predisposed' to commit the crime." (footnote omitted)).

More commonly, however, the court instructs on the elements of the defense and allows the jury to decide the issue.¹⁵⁹ The Model Penal Code requires the defendant to prove entrapment by a preponderance of the evidence, and assigns that determination about whether the government improperly induced the violation to the court rather than the jury.¹⁶⁰

Using entrapment as a guide, a compliance defense to an FCPA charge would place at least the initial burden of production on the corporation to establish that it had an effective program to prevent and detect violations by employees. To the extent cooperation with the investigation is a factor in determining the program's effectiveness, the company would also have to shoulder that burden. Which party should bear the burden of persuasion on the issue is not as clear. For subjective entrapment, the issue is one of intent—whether the defendant was “predisposed” to commit the offense—while a compliance defense would focus on objective circumstances regarding the scope and operation of the compliance program along with the measure of cooperation.

As a defense based on external evidence rather than determining a defendant's subjective state of mind, the better approach would put the burden of persuasion on the corporation as well because it has access to the evidence it needs, and it is seeking to avoid criminal liability that would otherwise be assessed through the acts of its employees and agents. Similar to other nonexculpatory public policy defenses, the company should be required to show that the social benefit provided by its compliance program (and cooperation) outweighs the harm caused by the violation, thereby allowing an organization to avoid criminal punishment.

C. How Will Prosecutors Respond?

The compliance defense gives companies an avenue to avoid criminal liability that would otherwise be imposed under the respondeat superior theory of liability. The defense could result in fewer criminal prosecutions as companies institute vigorous programs to prevent and detect violations and cooperate with the authorities by revealing misconduct discovered within the organization. But, the number of investigations of companies that result in the filing of criminal charges is fairly small, and even fewer have the prospect of

¹⁵⁹ In *Jacobson*, the Supreme Court stated:

Because we conclude that this is such a case and that the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the [g]overnment's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails, we reverse the Court of Appeals' judgment affirming the conviction of Keith Jacobson.

503 U.S. at 554.

¹⁶⁰ MODEL PENAL CODE § 2.13(2).

going to trial. Most investigations, particularly those involving corporations scrutinized for potential FCPA violations, end with a deferred or non-prosecution agreement, along with a settlement with the SEC.¹⁶¹ In virtually every foreign bribery case to date involving a publicly traded corporation, the corporation agreed to pay a fine and civil penalty while making changes to its operations to address any possible shortcomings that allowed the violation to occur.

The impact of a compliance defense could be to embolden companies to resist the government with greater vigor because it affords them a means to defend against charges if they are filed. That means prosecutors would have to weigh the availability of the defense as another factor in deciding whether to pursue criminal charges against a company for an FCPA violation, and a borderline case might result in closing the investigation rather than seeking a resolution through a negotiated settlement. The compliance defense would give companies leverage in negotiating with prosecutors—a type of “nuclear option” in which the organization can threaten to take the case to trial and seek vindication through a defense that has never been available before, increasing the government’s risk of an adverse outcome. Whether companies would actually take advantage of that option is an open question, however, especially if cooperation with the government is one facet of determining whether the company has an effective compliance program.

The proposals for an FCPA compliance defense say little beyond asserting that it should be made available to organizations, so courts would have to determine the contours of the defense. Prosecutors are likely to argue that the extent of a company’s cooperation, including its willingness to promptly provide information about wrongdoing within the organization, would be significant evidence of the effectiveness of its program. That could create almost a catch-22 situation by giving the façade of a criminal defense that might not be available to a company if it focuses primarily on persuading prosecutors not to file charges by taking an aggressive stance in the investigative phase of the case. It would be a defense in name only, and have little impact on how prosecutors act. To the extent a company wants to rely on the compliance defense, it will have to act much the way it does now by cooperating fully with the government and holding the compliance defense in reserve.

On the other hand, completely removing cooperation from the assessment of the effectiveness of a compliance program would appear to undermine the rationale offered in favor of adopting the defense, that it would encourage companies to institute and expand such programs. If evidence of the company’s willingness to report violations was not considered, that would increase the potential for companies to adopt programs that were mere window dressing, or at least implement the lowest-cost program that would have a reasonable chance

¹⁶¹ Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 432 (2012) (“Many FCPA investigations ultimately result in settlements.”).

of realizing the benefit of the defense—the “do enough but not too much” approach to compliance. Removing cooperation means the determination of whether a program was effective would not include the steps crucial to enforcing the law when evidence of a violation is difficult to detect. So, prosecutors are likely to insist that cooperation be a factor in the effectiveness assessment, and courts are just as likely to respond favorably to that position. Indeed, it would be hard for companies to argue the contrary because few lawyers would want to advocate that criminal activity and a failure to cooperate with the authorities was acceptable conduct.

Determining the efficacy of a compliance program would be a new area of investigation for the government once it was clear that employees violated the law by paying a bribe to a foreign official. Prosecutors would anticipate that an organization could be expected to at least consider raising the compliance defense to an FCPA charge if one were available. Like a claim of alibi or self-defense, prosecutors would need to respond to this possibility by investigating its viability before deciding whether to file charges. That means the government will be determining not only what evidence it has to establish a crime, but also seeking information about how the company has implemented its compliance program in order to assess whether it can be found to be “effective,” whatever that criterion might require.

In order to combat a subjective entrapment defense, prosecutors can introduce evidence of a defendant’s character and “propensity” to commit the crime to demonstrate the person’s predisposition.¹⁶² Similarly, a company’s

¹⁶² See *United States v. Russell*, 411 U.S. 423, 440 (1973) (“[T]he subjective approach focuses on the conduct and propensities of the particular defendant in each individual case: if he is ‘otherwise innocent,’ he may avail himself of the defense; but if he had the ‘predisposition’ to commit the crime, or if the ‘criminal design’ originated with him, then—regardless of the nature and extent of the [g]overnment’s participation—there has been no entrapment.”); *United States v. Mayo*, 705 F.2d 62, 68 (2d Cir. 1983) (“If the government’s evidence of propensity stands uncontradicted, there is no factual issue for the jury to resolve and the defense will not be submitted.”); *United States v. Burkley*, 591 F.2d 903, 922 (D.C. Cir. 1978) (“In an entrapment case, however, the issue is precisely whether the accused, at the time of the government inducement, had a propensity to commit crimes of the nature charged—that is, whether he was predisposed to do so. After raising the defense of entrapment, the defendant cannot claim he is prejudiced by evidence indicating that at the relevant time he had a propensity to commit crimes such as those he is accused of committing.”). In determining whether a defendant can offer an entrapment defense, the jury can consider the following factors:

[T]he character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the [g]overnment; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated [g]overnment inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government.

United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977) (footnotes omitted).

compliance program covers a range of conduct beyond just potential overseas bribery, and should operate to address issues involving how the organization responds to a range of legal requirements, such as discrimination against employees, environmental issues, and tax reporting. Thus, prosecutors would look at the entire program, and may seek evidence of any instances in which it fell short of preventing civil or criminal violations, or failed to promptly detect and report misconduct by employees. A company could try to limit any inquiry into its compliance program by focusing solely on its efforts related to the particular FCPA violation rather than how it deals with other types of misconduct. But if a compliance defense were to be extended to other offenses, then the efficacy of a corporate program across a wider range of issues would become more relevant to evaluating whether the defense should apply.

A prosecutor concerned about a company asserting the compliance defense may look for evidence about all of its potential transgressions. Unlike an individual, organizations have no Fifth Amendment privilege against self-incrimination to resist producing documents,¹⁶³ so the company could be subjected to a thorough inspection of its compliance and any past transgressions. Questions about the frequency with which it receives reports of wrongdoing, its response to that information, and how often it reports misconduct to the government would all be fodder for the investigation. In addition to its compliance program, prosecutors might be interested in civil settlements the company has entered to resolve claims of misconduct to assess whether it has in place effective procedures to address how its employees act.

A grand jury would be a potent tool to investigate an organization's response to reported misconduct because of its broad powers to compel the production of evidence and the testimony of witnesses. As the Supreme Court noted in *Branzburg v. Hayes*, the grand jury has the right to "every man's evidence,"¹⁶⁴ and every circuit but one has found that a civil protective order

¹⁶³ See *Braswell v. United States*, 487 U.S. 99, 104 (1988) ("Had petitioner conducted his business as a sole proprietorship, *Doe* would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination. But petitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals. This doctrine—known as the collective entity rule—has a lengthy and distinguished pedigree.").

¹⁶⁴ 408 U.S. 665, 688 (1972). The Court explained:

Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common-law, or statutory privilege is particularly applicable to grand jury proceedings.

Id. (citations omitted).

sealing records in a civil case will not prevent the government from obtaining them for use in a criminal investigation.¹⁶⁵

The adoption of a compliance defense might well result in encouraging prosecutors to scour a company's records for evidence to undermine the claim that its program meets the requirements for being determined an "effective" one. And to the extent cooperation is an element of the defense, then an organization would be foolhardy to refuse requests for documents and interviews with corporate employees on issues that might be far removed from the FCPA violation, at the risk of undermining a compliance defense at trial.

Even if a compliance defense invites greater scrutiny of a company's operations, it could deter prosecutors from undertaking the additional investigation required to resist the defense because of the additional resources needed. In a close case, prosecutors may forego a more extensive investigation and instead either close the case or agree to a reduced settlement with the company. The effect of the defense could be to reduce the number of cases that proceed beyond the investigative stage, a net gain for corporations. But there is still the risk that a particular case is one in which prosecutors will be willing to invest the resources necessary to review how a company's compliance program has operated. The balance is between greater leverage to resist charges, with the likelihood of fewer cases and lower settlements, with the potential for a disruptive investigation and risk of a public airing of corporate dirty laundry from instances in which the compliance program failed to prevent or detect violations.

While a violation does not necessarily prove the program was ineffective, prosecutors would certainly point to the particular failure in the case under investigation to show a broader lack of effectiveness. The company would be in the position of arguing that the employee involved was a rogue that it could not control, which may not be a very appealing position. Prosecutors would have an incentive to raise as many violations as possible to demonstrate the inadequacies of the compliance program, and piling on charges against a

¹⁶⁵ See *In re Grand Jury*, 286 F.3d 153, 159 (3d Cir. 2002) ("[A]bsent exceptional circumstances, protective orders should not serve to interfere with the unique and essential mechanism of a grand jury investigation."); *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir. 1998) ("A grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order."). The Second Circuit took a more restrictive approach, upholding a civil protective order absent a strong showing of need by the government. See *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) ("[A]bsent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation, either as evidence or as the subject of a possible perjury charge.").

company could be a means to negate the compliance defense. The rationale for the defense as a means to limit the authority of the prosecutor may well be undermined in some cases if the government needs to prove a greater range of misconduct to counter a compliance defense. And as the company's only viable defense at trial under the respondeat superior theory of liability, the organization's compliance program may well become the focal point of the case rather than the underlying misconduct. A public prosecution of a major corporation is likely to draw significant media interest, and scrutiny of how it complied with the law will be front and center.

If an investigation was not resolved through a pretrial agreement and instead proceeded to trial, the government could be expected to offer any evidence it obtained showing the program was ineffective, including proof of other instances in which the company did not meet the requisite standard. That would be a type of propensity evidence to show the company was prone to violations and therefore should not gain the benefit of a compliance defense to avoid liability. FCPA cases often occur over a significant period, so any other transgressions by corporate employees during that period could be used to show that the program should not shield the company from liability. A great deal of a company's "dirty laundry" could be aired in public beyond just the violation at issue, a prospect that may not be very appealing. Much like the entrapment defense puts a defendant's propensity to commit the crime on display, the compliance defense could open up any failings of an organization as fair game for establishing its liability. And if the government were able to convict a corporation that offered a compliance defense, the organization would need to undertake extraordinary remedial measures if it ever hoped to offer the defense again. Thus, the compliance defense might well become a one-shot basis to resist charges, useful only in the first prosecution in which it was raised.

V. CONCLUSION

The compliance defense may not be the unadulterated benefit for companies that has been presented by proponents. Organizations will still face enormous pressure to cooperate even if it were adopted, and establishing the defense is not likely to lessen the pressure to any significant degree because a failure to cooperate may show the company's program was ineffective. Prosecutors will also need to pursue evidence of a company's internal operations to establish its liability if they believe it may try to fight any charges by asserting the defense, and so can be expected to use the power of the grand jury to gather the documents and testimony needed if the investigation is not resolved through an agreed disposition.

The fact that an organization may bear the burden of production, and perhaps persuasion, for the defense would not diminish the government's need to assess the effectiveness of the program or how prosecutors could counteract the claim if the case proceeds to trial. Inviting prosecutors to scrutinize an organization for examples of misconduct by its employees may not be what

companies wish for when they propose the adoption of a compliance defense to the FCPA.